Supreme Court, U.S.
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No. 91-1482

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

LEONA WOODS,

Petitioner,

v.

AT&T INFORMATION SYSTEMS, INC., a corporation, and N.R. MADHOK, individually,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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RESPONDENTS' MEMORANDUM IN OPPOSITION

MARGARET MCMORROW-LOVE
FELLERS, SNIDER,
BLANKENSHIP, BAILEY
& TIPPENS
2400 First National Center
Oklahoma City, OK 73102
(405) 232-0621

Of Counsel:
JOSEPH RAMIREZ
ROBERT W. BENSON

REX E. LEE *
DAVID W. CARPENTER
THOMAS W. MERRILL
SIDLEY & AUSTIN
One First National Plaza
Chicago, IL 60603
(312) 853-7237

Attorneys for Respondents AT&T Information Systems, Inc. and N.R. Madhok

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether the court of appeals properly rejected petitioner's contention that the substantive provisions of the Civil Rights Act of 1991 should be applied retroactively to this case where petitioner offered no explanation of how retroactive application could require a new trial on her claims and where these provisions of the new Act could have no effect on any of petitioner's claims?

STATEMENT REQUIRED BY RULE 29.1

AT&T Information Systems, Inc. was at the time the action was filed a wholly-owned subsidiary of American Telephone and Telegraph Co. (AT&T). Since then, AT&T Information Systems, Inc. has been merged into AT&T. AT&T has no parent company. In addition to its wholly-owned subsidiaries, AT&T has ownership interests, either directly or through wholly-owned subsidiaries, in the following companies that have publicly-traded securities: Compagnie Industriali Riunite S.P.A., AT&T Capital Corporation, and AT&T Credit Corporation.

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RESPONDENTS' MEMORANDUM IN OPPOSITION

This petition purports to raise—but does not raise—the question whether the substantive provisions of the Civil Rights Act of 1991 are to be applied "retroactively" to cases that were pending on appeal when the statute was enacted. Petitioner asserts that the Tenth Circuit here refused to apply the new Act to vacate the judgment against her because the Tenth Circuit purportedly made a "determination" that the retroactivity issue was controlled by "the line of authority in *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204 (1988)," rather than by "this Court's decision in *Bradley* v. *School Board of City of Richmond*, 416 U.S. 696 (1974), which sustains the requirement that courts of appeals apply the statutory law in existence at the time of the appellate court ruling." (Pet. i).

However, the Tenth Circuit made no such holding. It summarily denied the retroactivity claim in a one-

sentence order that did not address the merits of the retroactivity issue at all. Petitioner had offered no explanation of how the application of the Civil Rights Act of 1991 could require reversal of the trial court's judgment against her. Further, it was, and is, plain that the retroactive application of the new Act could not affect any of petitioner's claims. For these and other reasons, this case is manifestly inappropriate for review by this Court.

STATEMENT OF THE CASE

Petitioner Leona Woods was formerly employed as a Zone Manager for AT&T Information Systems, Inc. ("AT&T"). In 1986, AT&T received information that petitioner was responsible for destroying certain revenue records. After an internal investigation, petitioner was reprimanded for this conduct. Later that year, eight managers who reported to petitioner made serious accusations of mismanagement and misconduct by petitioner. After a further internal investigation, AT&T concluded that petitioner was guilty of numerous violations of the company's code of conduct. Petitioner elected to retire rather than resign or be terminated.

In this case, petitioner claimed that she had been terminated by AT&T because of her sex in violation of Title VII of the Civil Rights Act and because of her age in violation of the Age Discrimination in Employment Act ("ADEA"). Petitioner tried the case on the theory that AT&T had engaged in "disparate treatment" of employees on the basis of age and sex, *not* that AT&T's facially neutral policies had a "disparate impact." At the close of all the evidence, the court dismissed petitioner's Title VII sex discrimination claim. The ADEA claim was then submitted to a jury, which returned a verdict in favor of respondents.

On appeal, petitioner devoted the bulk of her briefs to challenging the district court's decision to impose Rule 11 sanctions on petitioner's counsel and the district

court's resolution of related discovery disputes. (*See* Pet. 3b-5b). In addition, petitioner noted that both the Senate and House had passed bills entitled the Civil Rights Act of 1990. In an unpublished opinion, the Tenth Circuit concluded that the district court did not abuse its discretion in its resolution of the discovery disputes or in its award of sanctions against petitioner's counsel. (Pet. 3b-5b). The court declined to address the relevance of the Civil Rights Act of 1990 because "[t]he Act never became law." (Pet. 5b).

On November 21, 1991, the President signed the Civil Rights Act of 1991 into law. After the court of appeals issued its decision, petitioner filed a petition for rehearing, with suggestion for rehearing en banc. The petition for rehearing was, again, principally devoted to her objections to the discovery rulings and sanctions. However, petitioner also noted that the Civil Rights Act of 1991 had been enacted, and she asserted that rehearing was warranted to decide whether the 1991 Act should be applied retroactively to her sex discrimination and age discrimination claims. Nowhere in the rehearing petition, however, did petitioner explain how the new requirements of the 1991 Act, if applied to her case, could require reversal of the judgment or a new trial. The petition for rehearing with suggestion for rehearing en banc was denied on February 7, 1992 (Pet. 1a-2a).

REASONS FOR DENYING THE WRIT

This Court may someday wish to decide the issue of whether the Civil Rights Act of 1991 is ever to be applied retroactively to cases that were pending when it was enacted. However, this case is a manifestly inappropriate vehicle. Here, the Tenth Circuit summarily rejected petitioner's claim without addressing the merits of the retroactivity issue.[1] Petitioner had not provided any

[1] Because the retroactivity argument was concededly presented to and rejected by the Tenth Circuit, it would be inappropriate to va-

explanation of how the application of the Civil Rights Act of 1991 could require reversal of the judgment against petitioner or a new trial. And it is plain that the new Act could not affect any of petitioner's claims. Further, if the Tenth Circuit had somehow intended a broader ruling, its decision does not conflict with the decision of any other court of appeals.

First, to raise a retroactivity claim, petitioner must do more than point to recently enacted legislation, say that it presents an interesting issue of retroactivity, and ask the court of appeals (or this Court) to consider that issue. She must show how the provisions of the Civil Rights Act of 1991, if applied to her case, would require a new trial. Her failure to do so itself provided ample basis for the denial of the petition for rehearing—and likewise provides ample basis for denying the Petition for Certiorari.

Second, it is plain that the retroactive application of the 1991 Act could have no effect on petitioner's claim. Petitioner tried this case on a theory of disparate treatment, with respect to both the Title VII claim and the ADEA claim. The 1991 Act does not change the burden or standard of proof in disparate treatment cases brought under Title VII or the ADEA, and the new Act has no effect on the holdings that petitioner's evidence of disparate treatment was insufficient. Indeed, the only provision of the new Act that addresses the ADEA relates to the statute of limitations, which was not at issue in this case. (Pet. 20h-21h).

The Civil Rights Act of 1991 does contain new provisions governing the burden of proof in Title VII cases

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cate and remand to the court of appeals—as this Court has done in cases where the final decision of the court of appeals was entered before the Act was passed or where the court of appeals otherwise had no opportunity to consider the retroactivity issue. *Hicks* v. *Brown Group, Inc.*, No. 91-1116 (March 2, 1992); *Holland* v. *First Virginia Banks, Inc.*, No. 91-974 (Feb. 24, 1992); *Gersman* v. *Group Health Assn.*, No. 91-724 (Jan. 27, 1992).

based on a theory of disparate impact (Pet. 10h-11h). But those changes are irrelevant to this case because petitioner introduced no evidence of disparate impact. Petitioner had attempted to introduce such evidence in support of her *age discrimination* claims by attempting to call, as her final witness, an expert who was to present statistical information. However, the district court excluded this testimony on the ground that no prior evidence of disparate impact had been presented by petitioner and that there thus was no foundation in the record for her "expert's" opinion testimony. *See* Tr., Vol. III, pp. 366-68.[2]

There is nothing in the new Act that affects this holding, and the same outcome would have been reached if the case had been tried under the provisions of the new Act. As amended, Title VII still requires that petitioner prove "that respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin," and the 1991 Act does not alter the burden of proof for disparate impact claims under the ADEA at all. (Pet. 10h). In short, petitioner's failure to present any evidence of any disparate impact would not be cured by anything contained in the Civil Rights Act of 1991.

Finally, even if the provisions of the Civil Rights Act of 1991 did bear on the issues presented in this case, this Court's review would not be warranted. Only one court of appeals—the Sixth Circuit—has reached the question whether the 1991 Act should apply to cases commenced before the effective date of the Act. That court, consistent with the action of the Tenth Circuit here, concluded that the Act should not be applied retroactively. *Vogel*

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[2] The district court specifically found that the particular employment practice identified by the expert, known as a Management Incentive Pay Plan, not only had no application to petitioner, but operated on the basis of inverse seniority and thus could not be offered as evidence of age discrimination. *Id.* The proposed statistical evidence did not address the claim of sex discrimination.

v. *City of Cincinnati*, No. 91-3474 (6th Cir. March 13, 1992). Both the Equal Employment Opportunity Commission and the Department of Justice have taken the same position. *See* 1992 *Daily Labor Report* (BNA) No. 2, D-1–D-3 (Jan. 2, 1992) (EEOC); 1991 *Daily Labor Report* (BNA) (Dec. 4, 1991) (Department of Justice). Thus, there is now no conflict among the courts of appeals on the retroactivity question or any other reason that would require this Court's review of the issue at this time.[3]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

MARGARET MCMORROW-LOVE
FELLERS, SNIDER,
BLANKENSHIP, BAILEY
& TIPPENS
2400 First National Center
Oklahoma City, OK 73102
(405) 232-0621

Of Counsel:
JOSEPH RAMIREZ
ROBERT W. BENSON

REX E. LEE *
DAVID W. CARPENTER
THOMAS W. MERRILL
SIDLEY & AUSTIN
One First National Plaza
Chicago, IL 60603
(312) 853-7237
Attorneys for Respondents AT&T Information Systems, Inc. and N.R. Madhok

* Counsel of Record

April 8, 1992

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[3] Petitioner likewise provides no argument that would support her request that this Court review the propriety of the district court's discovery and evidentiary rulings. (Pet. i). Those rulings, which were fully considered and affirmed by the court of appeals (Pet. 3b-5b), raise no question of general significance that would warrant this Court's review.